[2021] JMSC Civ 58

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 01095

In the Estate of KENNETH LEIGHTON PEART aka 'FUDGIE' late of 6 Mount Calm Drive, Belgrade Heights, Kingston 19 in the parish of Saint Andrew deceased.

BETWEEN	**KENNETH LEIGHTON PEART (Son of the deceased KENNETH LEIGHTON PEART aka 'FUDGIE')**	**CLAIMANT**
AND	**NADINE CARLENE PEART (Executrix of the Estate of KENNETH LEIGHTON PEART aka 'FUDGIE')**	**1st DEFENDANT**
		2nd DEFENDANT
AND	**DONNA-KAYE ELENE SHARPE (Executrix of the Estate of KENNETH LEIGHTON PEART aka 'FUDGIE')**	

IN CHAMBERS (Via Zoom)

Mr Ian Wilkinson Q.C. and Mr Lenroy Stewart instructed by Wilkinson Law for the Claimant/Respondent.

Mr. Charles Piper Q.C., Mr Denzle Latty and Mr D'Angelo Foster instructed by Mr Denzle Latty for the First Defendant

Mr Philmore Scott instructed by Philmore H. Scott and Associates for the Second Defendant.

HEARD: March 10, and March 25, 2021.

Civil Practice - Whether order irregular - Whether judge had jurisdiction to make order - Whether Judge of concurrent jurisdiction has the authority to set aside another judge's order.

A. PETTIGREW-COLLINS J

THE APPLICATION

[1] The applicant (first defendant in the substantive claim) filed a Notice of Application for Court Orders (NOCA) on the 24th of November 2020 seeking certain orders. The respondents have, by a point in limine, objected to the applicant pursuing items 2 and 3 of her NOCA. This judgment concerns only that preliminary objection.

[2] The orders sought by the applicant are as follows:

1) Permission be granted to the applicant/first defendant to file the affidavit in support of this Application in light of Item 6 of the order of the Honourable Mrs. Justice Lindo made on the 18th of December 2018.

2) Items 1, 2 and 4 of the order of the Honourable Ms. Justice A. Thomas (Ag.) made on the 17th of May 2018, and Items 1 and 2 of the order of the Honourable Mrs. Justice A. Lindo made on the 28th of November, 2018 be set aside.

3) The claimant repays the said sums paid to him to the applicant/first defendant or the estate as the case may be or, alternatively the said sums be deducted from the claimant's share in the estate and refunded to the payer.

4) The claimant provides the responses to the applicant/first defendant's request for information filed and served on the 17th of July 2020 within fourteen (14) days of the order herein, failing which the claimant's statement of case stands struck out.

5) The applicant/first defendant be permitted to file witness statements of five (5) witnesses in preparation for the trial of the action.

6) There be standard disclosure of documents within fourteen (14) days of the date of the order herein.

7) There be inspection of documents within twenty-eight (28) days of the date of the order herein.

8) The cost of and incidental to the application be provided for.

9) There be such further or other relief as the court deems just.

[3] The first defendant's application was made on a number of grounds, but I will recite only the grounds which are relevant to the claimant and second defendant's preliminary objection. The following are the relevant grounds:

a) At the time of the making of the said orders referred to at item 2 of this Notice of Application for Court Orders, the claimant was over the age of 21 years and was not shown to have been suffering from any mental or physical disability to warrant being provided for out of the estate under Section 6 of the Inheritance (Provisions for Family and Dependants) Act.

b) At the time of making of the orders referred to at item 2 of this Notice of Application for Court Orders, there was no jurisdiction in the Learned Judge to do so and, accordingly, the said orders are irregular.

c) In the event that the Court finds that the said orders were irregularly made and ought properly to be set aside, the said sums ought to be refunded.

d) The claimant by his Attorneys-at-Law has threatened to commence contempt proceedings against the applicant/first defendant for failing or refusing to continue the payments at a time when the claimant is of an age in excess of 28 years old.

BACKGROUND

[4] In the substantive claim which was brought by the claimant Kenneth Leighton-Peart, he sought orders declaring the will of his late father Kenneth Leighton Peart (aka Fudgie) void, thereby seeking to have the estate administered as upon an intestacy. He also sought a declaration that he is entitled to apply for Letters of Administration in his father's estate. He subsequently brought two separate applications by way of Notices of Application for Court Orders, resulting in the granting of the orders the applicant/first defendant now seeks to have set aside.

[5] The relevant orders made by Thomas J which the first defendant is seeking to set aside are:

a) Interim Order made for the sum of Jamaican one million one hundred and sixty-six thousand four hundred and twenty-eight dollars and thirty-one cents (J$1,166,428.31) to be paid to the University of the West Indies, Faculty of Medical Sciences, School of Dentistry on behalf of the claimant by the named executrices from the funds of the estate of the deceased to be made on or before the 31st of May 2018;

b) Interim payment of Jamaican forty thousand dollars (J$40,000.00) per month to be made to the claimant by the named executrices with effect from the 1st of June 2018 from the funds of the estate payable to the claimant's Attorney-at-Law;

c) Costs of today are awarded to the claimant and the 2nd defendant to be paid from the estate.

[6] The impugned orders made by Lindo J are as follows:

1) Interim Order is made for the sum of one million eight hundred and twenty thousand dollars ($1,820,000.00) to be paid to the University of the West Indies, Faculty of Medical Sciences, School of Dentistry on behalf of the claimant by the named executrices from the funds of the estate of the deceased on or before the 20th of November 2018.

2) Interim Order made on the 17th of May 2018 by Ms. Justice A. Thomas (Ag.) for payment of forty thousand dollars ($40,000) per month from the funds of the estate to the claimant is extended until the determination of the matter.

THE OBJECTION

[7] The claimant/respondent gave notice that he was objecting to some aspects of the application being heard, on the ground that a judge of the Supreme Court has no jurisdiction to hear those aspects of the application. The second defendant through her Attorneys-at-Law also supported the claimant's position.

[8] The notice of preliminary objection was given orally (as far as this court is aware) but the first defendant's Attorney-at-Law did not in any way indicate that he was taken by surprise. In fact, the claimant's Attorneys-at-Law had filed submissions in support of the preliminary objection. Counsel Mr Piper of the inner bar in fact intimated at the outset of the hearing that the court should deal with the preliminary objection before hearing the substantive application. Even though I did not specifically say so, I bore in mind the limited time available to me and decided to do accordingly. Consequently, only the preliminary objection was heard.

THE SUBMISSIONS IN SUPPORT OF THE OBJECTION

[9] Mr Wilkinson of the inner bar supplemented the filed skeleton submissions with oral submissions. He observed that the first defendant had waited two years after the date of the last order to file his Notice of Application, and in any event, this court has no authority or jurisdiction to set aside the orders of Thomas and Lindo JJ. He submitted that the general rule is that a judge of the Supreme Court cannot set aside the orders of another judge of concurrent jurisdiction. He cited the case of **Leymon Strachan v The Gleaner Company and Another** (PC Appeal no. 22 of 2004), a decision of The Judicial Committee of the Privy Council. Mr Wilkinson Q.C. acknowledged that there are exceptions to the general rule. One exception he noted, was highlighted in the case of **The Geon Company v Thermo-Plastics Jamaica Ltd,** JM 2008 SC 6 at paragraphs 25 and 26. This case involved the setting aside of an order made ex-parte.

[10] Queen's Counsel also observed that the applicant did not rely on any provision of the Civil Procedure Rules (CPR) to ground her application. He submitted that there are instances in which the CPR gives a judge of concurrent jurisdiction the authority to set aside the order of another judge. He cited as an example, the rule relating to the setting aside of default judgements.

[11] Mr. Wilkinson further asked the court to have regard to the fact that the orders under consideration before me were made properly (i.e. regularly) at an inter-partes hearing where all the parties were present and duly represented by legal counsel. Counsel also asked the court to have regard to the decision of Batts J. in the case of **Celia Diane Pershadsingh v Dr. Jepthah Ford** [2015] JMSC Civ. 123.

[12] Queen's Counsel further submitted that the appropriate course of action which the applicant should have adopted was to seek leave to appeal the decisions of the learned judges within the relevant period. He observed that such periods have long passed, without any leave having been sought. Mr Wilkinson submitted that the application is therefore ill-conceived, without merit, frivolous, vexatious and an abuse of the process of the court.

[13] Counsel for the second defendant Mr. Philmore Scott also filed submissions in support of the claimant's position. In his submissions, Mr. Scott made reference to the principle that once a judgment is perfected, it cannot be corrected or amended. He directed the court's attention to rule 42.10 of the CPR which only allows a judge to correct clerical mistakes. Counsel made reference to a number of cases which make the point that the slip rule does not entitle a judge to reconsider a final and regular decision, once the order has been perfected. He also directed the court's attention to the case of **Leymon Strachan v The Gleaner Company and Another (**supra).

APPLICANT'S SUBMISSIONS IN RESPONSE

[14] Mr. Piper Q.C. argued that the relevant orders of Thomas and Lindo JJ. are irregular and therefore liable to be set aside. He asked the court to have regard to the provisions of section 2(c) (i) and (ii) of the Inheritance (Provisions for Family and Dependants) Act dealing with the definition of a child. Counsel submitted that an order

could not properly have been made by a court in favour of the claimant pursuant to that provision, as an order made pursuant to that provision could not extend to a child beyond 23 years of age, unless such child has a physical or mental disability. He noted that the claimant in this case was admittedly 26 years old at the time he made the application and that there was no evidence that he had any physical or mental disability. He urged that the court could not therefore properly have made the orders that were made.

[15] Queen's Counsel also pointed out and I will at this early stage say correctly so, that the application to set aside the orders, is not an application to correct a clerical error. He asserted that it is an application to set aside orders made outside of the statutory powers of the learned judges. He stated that the right to set aside the orders cannot be waived. He adverted to the existence of the exceptions to the general rule identified in **Leymon Strachan v The Gleaner Company and Another (**supra). He asked the court to have regard to paragraphs 25, 27, 28 and 29 of that judgment.

[16] It was further urged that the fact that counsel for the first defendant was present at the hearing when the orders were made, but failed to take the point that the court had no jurisdiction to make the orders, does not preclude the first defendant from now taking the point. He alerted the court to the decisions of **Lewis v St. Hillaire and Another**, (1965) 48 WIR 134 and **Isaacs v Robertson**, Privy Council Appeal No. 2 of 1983 as authority for the proposition that where there is an irregularity in proceedings, an application may be made to set aside an order flowing from those proceedings. Queen's Counsel also directed the court's attention to **Hopefield Corner Ltd v Fabrics De Younis Ltd**. SCCA No. 7/06, where the Court of Appeal of Jamaica determined that a judge of the Supreme Court had the power to set aside an order that was irregular, and which was made by a judge of concurrent jurisdiction.

REPLY TO APPLICANT'S SUBMISSIONS

[17] Mr. Wilkinson Q.C. and Mr Scott were permitted to address the authorities raised by Mr. Piper. Mr Wilkinson pointed out that the application was not made pursuant to the Inheritance (Provisions for Family and Dependants) Act and that the Court has inherent jurisdiction to make the orders complained of, given the provisions of Section 48(g) of the Judicature Supreme Court Act. He also submitted that Mr. Piper Q.C. was wrong in his interpretation of Section 2(c) (i) and (ii) of the Inheritance (Provisions for Family and Dependants) Act. He further submitted that one would have had to lift the reference to the age limit in (i) and import it to (ii) in order for the sub-paragraph to have the meaning advocated by Mr. Piper. He went on to say further that even if the judges had no jurisdiction to make the orders they did, that absence of jurisdiction did not render the orders irregular, He postulated that a statute cannot be interpreted as giving jurisdiction, unless provisions of that statute indicate that that is the intent of Parliament.

[18] Mr Wilkinson Q.C. also submitted with reference to the case of **Lewis v St. Hillaire and Another** (supra), that the first defendant would have waived the right to challenge the order, as she had participated in the proceedings, even if the order was an irregular one. In relation to **Isaacs v Robertson**, he observed that that was a case of the appellant asserting that an order was a nullity and so disobedience of it could not constitute a contempt of court but that the Judicial Committee of the Privy Council promptly debunked the existence of any such principle of law.In relation to the case of **Fabric de Younis,** Mr. Wilkinson Q.C. observed that the Court of Appeal had found that the order of Justice Cole-Smith was irregular and therefore liable to be set aside.

[19] Mr. Scott submitted that the provisions of Section 4(2) of the Inheritance (Provisions for Family and Dependants) Act are relevant to the claimant's application since the first defendant is alleging that the will is valid. I understood him to be saying that the orders made in favour of the claimant could have been made pursuant to section 4(2) of the Act, which does not limit the court's jurisdiction by virtue of age or special circumstances such as disability, but allows a child (as in an offspring of the deceased) to make the application, irrespective of the age of that child. I hope I do no disservice to counsel in reproducing what I understood him to have said.

AN ASIDE

[20] The first observation I make is that the orders in question were to be complied with by both defendants; they being the executrices of the estate of Kenneth Peart, aka Fudgie, deceased. While the second defendant did not say that she has no access to the funds of the estate, I note her affidavit evidence that a payment of $US2,250 made by her to the claimant on the 9th of October 2019 was paid from her own resources (paragraph 9 of her affidavit filed on the 23rd of February 2021). This was done she said, because neither the first defendant nor her Attorney-at-Law was responding to the claimant's request for payments to be made to facilitate the claimant sitting his licensing exam prior to the deadline. Notwithstanding this assertion, she has not given any reason why she has not complied with the order.

[21] I make reference to this matter in passing since during the course of the hearing, counsel for the applicant/first defendant stated that it was the first defendant only who has complied with the court orders. The Attorneys-at-Law representing the claimant and second defendant, did not seek to disavow that assertion.

APPLICABILITY OF INHERITANCE (PROVISIONS FOR FAMILY AND DEPENDANTS) ACT

[22] As Mr Wilkinson Q.C. pointed out, the claimant's applications resulting in the orders made by Thomas and Lindo JJ were not made pursuant to the provisions of the Inheritance (Provisions for Family and Dependants) Act. A glance at the NOCA in each application confirm that this observation is accurate. While I doubt the applicability of section 4(2) of that Act in the circumstances of this case, I make no pronouncement in that regard. I am of the view that the court could have made the orders quite independently of the provisions of the Inheritance (Provisions for Family and Dependants) Act.

[23] Assuming that I am wrong in my view, I nevertheless disagree with Queen's Counsel Mr Piper's interpretation of the provisions of section 2 (c) (i) and (ii) of the Act. The relevant sub paragraphs are concerned with the meaning of the term 'child'. For

convenience, I reproduce hereunder, the entire portion of section 2 dealing with the definition of 'child'.

> *(a) A child adopted in pursuance of an adoption order made under the Children (Adoption of) Act or a child adopted in pursuance of any law in a country other than Jamaica where that law is recognized by the law of Jamaica as conferring upon the child in question, in relation to the child's custody, maintenance and education, the status of a child of the adopter or adopters;*
>
> *(b) A child en ventre sa mere at the death of the deceased;*
>
> *(c) A child of the deceased's husband or wife, as the case may be, who had been accepted as one of the family by the deceased,*
>
> *(d) So, however, that a child of or over the age of eighteen years may be regarded as a child for the purposes of this definition-*
>
> *(i) If such child is under the age of twenty-three years and pursuing academic studies or receiving trade or professional instructions; or*
>
> *(ii) If there are special circumstances (including physical and mental disability) which justify the disregard of the age limit*

[24] I agree with Queen's Counsel Mr Wilkinson's interpretation of the section. Sub paragraph (i) is distinct from sub paragraph (ii). It is accepted that the use of the word 'or' denotes that only one of the listed requirements has to be met, whereas where the conjunction 'and' is used, all of the listed requirements must be met. It is accepted that there are instances when that strict grammatical construction may lead to an odd result and so a court may be required to read 'and' where the word 'or' is used, and vice versa. There will also be instances where the distinction is rendered nugatory based on the context and on the purpose of the particular legislation.

[25] Quite apart from the use of the conjunction, the meaning of the words used in subparagraph (ii) makes it pellucid that physical and mental disability are among the factors which may justify a disregard of the age limit and are not the only factors that can be used to justify a disregard of the age limit. The upshot of my finding is that even if the learned judges could only have properly made the orders pursuant to the said

legislation, they would not necessarily have been barred from so doing, based on the wording of the statute. I now turn to a consideration of the authorities that were cited.

WHETHER ORDER IRREGULAR – WHETHER JUDGE OF CONCURRENT JURISDICTION HAS AUTHORITY TO SET ASIDE ORDER

The Law

[26] I now consider whether the principles elucidated in **Levmon Strachan** (supra) and a number of other cases cited by the parties can stand in the way of the applicant overcoming the preliminary objection. This I do in the event I am wrong in concluding as I have done thus far.

[27] As set out in paragraph 1 of the judgment of the Judicial Committee of the Privy Council, in **Leymon Strachan**, the appeal was brought by the plaintiff in an action from a judgment of the Court of Appeal of Jamaica, dismissing his appeal from the refusal of Smith J to set aside an earlier order of Walker J. as being made without jurisdiction. By his order, Walker J. had purported to set aside a default judgment for damages to be assessed after the damages had already been assessed and the final judgment entered in the plaintiff's favour. The Board determined that Walker J. had the jurisdiction to set aside the judgment for damages to be assessed.

[28] Although it was not strictly necessary to a disposition of the case, Lord Millet who delivered the opinion of the Board, addressed the following question: if Walker J had no jurisdiction to set aside the judgment for damages to be assessed, was his order a nullity which Smith J had the jurisdiction to set aside?

[29] He formulated the inquiry in this way:

> *"whether an order of a judge of the Supreme Court made without jurisdiction is a nullity, not in the sense that the party affected by it is entitled to have it set aside as a matter of right and not of discretion,(observing of course that the party is entitled to have the order set aside) nor in the sense that the excess of jurisdiction can be waived (noting that it cannot) but in the sense that it has no*

more effect than if it had been made by a traffic warden and can be set aside by a judge of co-ordinate jurisdiction."

[30] At paragraph 28 he reasoned thus:

> *"An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess."*

[31] At paragraphs 29 and 30 Lord Millet relied on the decision of Sir George Jessel Mr. Brett and Lindley LJJ in **In *re* *Padstow Total Loss and Collision Assurance Association*** (1882) 20 Ch. D 137 to show the effect of such an order. The case concerned an order of the high court to wind up an association which it thought breached a section of the Companies Act which section was of course applicable to companies only. Sir George Jessel MR said, at p 142

> *"The first point to be considered is whether, assuming that the association was an unlawful one, and that the Court had no jurisdiction to make the order, an appeal is the proper method of getting rid of it. I think it is. I think that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous."*

At p. 145 Brett LJ said:

> *"In this case an order has been made to wind up an association or company as such. That order was made by a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal."*

[32] Applying those principles, Lord Millet at paragraph **[32]** concluded that

> *"The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the Padstow case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it."*

[33] He held that Walker J had jurisdiction to make the order he did and if he was wrong in making that order, his decision could be reversed **by the Court of Appeal** which would be bound to set it aside as a nullity. However, the order was fully adjudicated and binding on the parties until **reversed by the Court of Appeal**. Smith J, a judge of co-ordinate jurisdiction, therefore had no power to set it aside.

[34] In paragraph 25 of **Leymon Strachan**, Lord Millet spoke of orders which are inaccurately described as nullities and those which are irregular and observed that "*the distinction was between defects in procedure which the parties can waive and which the court has a discretion to correct, and those defects which the parties cannot waive and which give rise to proceedings which a defendant is entitled to have set aside ex debito justitiae."*

[35] The decisions in the cases of **Lewis v St. Hillaire and Another** (supra), and **Isaacs v Robertson** (supra), both Privy Council decisions emanated from St Vincent and the Grenadines. These cases support the proposition that if a defect in proceedings is ignored, then that defect is waived and the party ignoring the defect is nevertheless bound by any order made in those proceedings or any consequence which logically flow from such waiver.

[36] In **Lewis v St Hillaire**, the appellant had issued a writ against the respondent seeking certain remedies. The respondent entered an appearance. Thereafter, neither side took any steps in the matter. Sometime later, the respondent filed a summons to deem the action abandoned as was permitted by rules of court. The judge determined that it was required that the matter be "ripe for hearing" within the meaning of the relevant rules before the action could be deemed abandoned. The Court of Appeal reversed the decision on the ground that "ripe for hearing" was not a precondition for the filing of a summons to deem the matter abandoned. The plaintiff appealed to the Judicial Committee of the Privy Council. The Board interpreted Order 34 rule 11(1)(a) of the Rules of the West Indies Associated States Supreme Court which provided that:

> *"(1) A cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment – (a) any party has failed to take any proceeding or file any document therein for one year from the date of the last proceeding or the filing of the last document therein …"*

At page 149 of the judgment of the Board Lord Steyn said

> *"The party who wishes to proceed can lawfully waive the point that an action is abandoned under Ord. 34, r. 11(1)(a). And, if it is not raised by a defendant, the court cannot take the point of its own motion: Isaacs v. Robertson, [1985] AC 97 102E–F, per Lord Diplock. In circumstances where a party is content not to take the point under rule 11(1)(a) the other parties are protected by Ord. 3, r. 6, which requires that they be given notice of the intention to proceed."*

[37] In ***Isaacs v Robertson***, the appellant had contended that because of the application of Order 34 Rule 11 (1) (a), (the same rule with which the court was concerned in **Lewis v St Hillaire**) an order by the High Court granting an interlocutory injunction was a nullity, and therefore disobedience of the order could not constitute a contempt of court. The Board dismissed this contention and agreed with the Court of Appeal that, although the order granting the injunction ought not to have been made, and the appellant would have been entitled to have it set aside, he was in contempt for disobeying the order.

[38] The Board postulated that the order made had to be obeyed until it had been set aside by the court, whether that order was "*null or valid, regular or irregular*." In paragraph 11, the Board stated that there is a category of orders made by a court of unlimited jurisdiction that a person affected by such orders is entitled to have set aside ex debito justitiae. Further, that the court exercising its inherent jurisdiction can set aside such order without such person needing to have recourse to the rules that deals expressly with proceedings to set aside orders for irregularity. My understanding of rules that deal expressly with proceedings to set aside orders for irregularity, is for example rules dealing with the setting aside of default judgments.

[39] The Board gave as an example of an order that may be set aside ex debito justitiae, an order made in breach of the rules of natural justice. It was also pointed out that courts have stayed clear of laying down a comprehensive definition of defects that would bring an order within the ambit of those which may be set aside ex debito justitiae. As was stated in paragraph 12 of the said **Isaac v Robertson**, an order is either regular or irregular; "*if it is irregular, it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal*."

[40] What then does it mean when it is said that an order or judgment is irregular? I will not attempt a comprehensive definition, suffice it to say that an irregularity usually arises where there is a failure to follow the procedure set by a rule of court or practice direction. That position may be demonstrated by the case of **Hopefield Corner Ltd v Fabrics De Younis Ltd**. (supra).

[41] In **Hopefield Corner**, the court observed that when Cole-Smith J. granted the application for modification, she was not aware that the respondent had not been served as she was in fact wrongly advised that the respondent had been served by post. (See paragraph 25 of the judgment.) The relevant practice direction required that notice be given to persons who appear to be entitled to the benefit of the restrictions. Additionally, it provided that a final hearing conducted in breach of the practice direction or of Rule 8 (which stipulated that the time for objecting must be specified) is an irregularity and is liable to be set aside on application by anyone entitled to be heard.

[42] It is abundantly clear that those circumstances meant that the judgment that was held to have been properly set aside was an ex-parte judgment. It was an ex-parte order as far as the respondent was concerned. The case falls squarely within the class of judgments which was adverted to in paragraph 25 of **Leyman Strachan,** that is the kind that a defendant is entitled to have set aside ex debito justitiae. The example given in that case was **Craig v Kanssen,** [1943] 1 KB 256 where (notice of) the proceedings were not served on the defendant at all. The order was therefore a nullity. The Board opined that it was unfortunate that Lord Greene MR had expressed the view that the court of first instance had an inherent jurisdiction to set aside such order which clearly it did not.

[43] In the matter of **The Geon Company**, the petitioner obtained a judgment against the respondent. The judgment remained unsatisfied. Upon a petition filed to wind up the respondent, Panton J made the order winding up the respondent company under provisions of the companies Act. The petitioner subsequently sought an order to set aside Justice Panton's order. McIntosh J granted the order. An application was filed seeking to have the order of McIntosh J set aside. One of the issues taken with that application was that the court had no power to set aside the order of McIntosh J, she being a judge of coordinate jurisdiction acting in a manner she considered to be within her jurisdiction. In giving judgment in the matter, Justice King said:

> *"An ex parte order of a judge of the supreme court who must be taken to have assumed jurisdiction to make that order, may properly be set aside by a judge of coordinate jurisdiction on the ground of it having been obtained by nondisclosure of facts of sufficient materiality to justify or require immediate discharge of the order without examination of the merits" Ralph Gibson LJ in Brinks Mat Ltd. V Elcombe CA (1988) 1 WLR1351 at 1356."*

[44] It was also said in **Geon Company v Thermo-Plastics (Jamaica) Ltd** Suit No. E300 of 1998, that if an ex-parte order is being challenged on the basis that the judge assumed jurisdiction that he or she did not possess, it cannot be challenged before a judge of coordinate jurisdiction but must be challenged by a process of appeal. While I make no definitive pronouncement on this statement of the law which was perceived to

be a part of the ratio of **Leymon Strachan**, I will say that this statement does not appear to be one that must necessarily be deduced from the decision in **Leymon Strachan**. The status of an **exparte order** made without jurisdiction was not in issue and therefore did not fall for consideration in that case. I am not in any event concerned with an exparte order in this instance.

Analysis

[45] One may refrain from, or fail to challenge an irregularity. If that is done, then he is taken to have waived that irregularity. I agree with Mr. Wilkinson Q.C. that, on the assumption that the order was irregular, then the first defendant would have waived the irregularity, she having participated in the proceedings. I am also in agreement with Mr. Piper Q.C. that the fact that counsel for the first defendant was present at the hearing when the orders were made, but failed to take the point then that the court had no jurisdiction to make the orders, does not preclude the first defendant from now taking the point. The question is, in what forum should the point be taken. I am not of the view that any of the authorities cited by the applicant supports her position.

[46] The instant case does not fall within the category of cases which may be set aside ex debito justitiae. The impugned orders are regular orders. There is no question of any defects in the procedure adopted when the orders were applied for and made. It was a question of whether the court could properly have made those orders, an issue of jurisdiction. The court having made the order, must be taken to have been satisfied that it had jurisdiction. It is a determination superior courts of record are entitled to make. Therefore, any challenge on the basis that such a determination was erroneous should be by way of an appeal.

[47] Queen's Counsel Mr. Piper's contention is that the learned judges could not properly have made the orders they did because the enabling legislation did not allow for these orders to be made having regard to the applicant's age at the time of the application. Those circumstances give rise to a challenge to the judges' jurisdiction to make the orders. The learned judges at the time of making the orders would have assumed that they had jurisdiction so to do. There would be no question of the orders

being irregular in the sense in which that term has been used in the authorities cited. The orders were made inter partes and were not obtained upon fraudulent information. Even if the orders were made in circumstances where the learned judges were in error as to the law, and consequently, had no jurisdiction or even if the orders were nullities, or vulnerable to be so declared, a judge of concurrent jurisdiction has no power to set aside those orders. Such an order by a court of record is valid and binding and any challenge must be by way of appeal. The first defendant's recourse was to have appealed those orders.

ANY OTHER COURSE OPEN TO THE FIRST DEFENDANT?

[48] As observed earlier, Mr Piper Q.C. for the applicant has chosen to challenge the orders, including the order for continuation of payments to be made to the claimant until the resolution of the substantive claim, on the legal basis that the orders are irregular. There is however an aspect of the matter that was entirely ignored. It is this: The affidavit of the applicant/first defendant discloses that she has been making payments from funds which do not form part of the property of the estate of the deceased on account of lack of access to the funds of the estate. She said the following at paragraph 10:

> *"I had no access to funds from the estate because, when I tried to gain such access to funds held by my husband's company, Fudgie's Multiple Enterprise and Fudgie's Wrecker Service to which I was signatory, I was denied such access by the Bank of Nova Scotia Limited on the ground that I had no rights to the said funds until there is a grant of letters of administration or a grant of probate."*

She exhibited a copy of her Attorneys-at-Law letter dated July 16, 2018 to the Bank of Nova Scotia Limited and a copy of the bank's response dated July 19, 2018. There is no indication that the bank was made aware of the Court Order. I am fully alert to the fact that this is not evidence that has been put to scrutiny, but if these assertions were to be proven to the requisite standard, then there would be a substantial change of circumstances which might render her unable to comply with the order of the court.

[49] In any event, it is noted that an administrator pendente lite was appointed. Such administrator has all the rights, powers and duties of a general administrator (see **Re Toleman** [1898] 1 Ch. 866) with one important restriction. He is not permitted to distribute the estate of the deceased to any beneficiary **without the leave of the Court**. I am of the view that the applicant/first defendant's application ought to be an application that those responsibilities be assumed by the administrator pendente lite since, until probate is granted the executors may not as a practical matter have access to the assets of the estate. The ability of an executor to deal with the estate while suit challenging the validity of the very will which purports to make that individual executor is questionable. I observe also that the orders of Thomas and Lindo JJ were made before the appointment of an administrator pendente lite.

[50] In the course of argument, it came to my attention that the first defendant may have been advised to cease making payments pursuant to the orders of the court. I take this opportunity to remind all parties concerned that even if a court could not properly have made an order, and the person against whom it was made was entitled to have such order set aside, that order must be obeyed until it is set aside. Thus, notwithstanding the entitlement to have an order set aside, that order may be enforced and any consequence flowing from the breach, may be visited upon the party in breach. See the cases already cited as well as **Solomon's Funeral Home Limited and Calmore Solomon v Errol Solomon** [2019] JMCA App 23 at para 68.

OTHER OBSERVATIONS

[51] I observe that this application to set aside the orders of judges of coordinate jurisdiction was placed before me notwithstanding that both judges whose orders are being challenged are still sitting. An application of this nature is best placed before the judge whose order is to be impugned. I have however determined in this preliminary application that when regard is had to the reasons put forward for setting aside the orders, the application must fail. The orders were perfected. They were made after hearings attended by all parties who were presumably properly served. Any error of fact or law or as to jurisdiction or otherwise may only be remedied by way of an appeal.

[52] I note in closing that the applicant has sought permission to file an affidavit in support of the present application. It was specifically stated that such application was based on Justice Lindo's order that no further affidavits should be filed in the matter without the permission of the court. That order could not apply to an affidavit in support of an application which had not yet been filed. I have as is evident, considered matters deponed to in the applicant's affidavit in support of her application.

CONCLUSION

[53] An examination of the various authorities cited makes it abundantly clear to me that the orders in question were regularly granted. If the first defendant /applicant was aggrieved by the making of those orders, her recourse was by way of an appeal.

[54] This court has no jurisdiction to hear and determine item 2 of the applicant/first defendant's NOCA filed on the 24th of November 2020. Item 3 of the NOCA also fails to the extent that the refund requested only become relevant if item 2 was granted. The question of repayment or restitution may become relevant after all issues are resolved at trial as is indeed the case with many interlocutory orders.

[55] The claimant and the second defendant therefore succeed on the preliminary objections and they are entitled to the costs of this hearing.

[56] The hearing of the items listed at 1, 4, 5, 6, 7, and 8 of the NOCA filed on the 24th of November, 2020 will be held on the 12th of April, 2021 at 10:00 am.

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Pettigrew Collins J
Puisne Judge